

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

I.

INTRODUCTION

Plaintiff Liliya Perelman ("Plaintiff") brings this action seeking to reverse the decision of the Commissioner of the Social Security Administration (the "Commissioner" or the "Agency") denying her application for Supplemental Security Income ("SSI"). The parties consented, pursuant to 28 U.S.C. § 636(c), to the jurisdiction of the undersigned United States Magistrate Judge. For the reasons stated below, the decision of the Agency is REVERSED and REMANDED for further proceedings.

II.

PROCEDURAL HISTORY

4 On February 13, 2006, Plaintiff filed an application for SSI
5 claiming that she became disabled on February 1, 2005. (Administrative
6 Record ("AR") 96). The Agency denied her application and she submitted
7 a request for reconsideration on December 15, 2006. (AR 82). The
8 Agency denied her application again on February 2, 2007. (AR 83-87).
9 Plaintiff then requested a hearing, (AR 89), which was held before
10 Administrative Law Judge ("ALJ") Lawrence D. Wheeler on April 10, 2008.
11 (AR 49). Plaintiff appeared with counsel and testified. (AR 51-73).

13 On June 26, 2008, the ALJ issued a decision denying benefits. (AR
14 10-20). Plaintiff sought review before the Appeals Council, which
15 denied the request on November 12, 2009. (AR 3-5). Plaintiff filed the
16 instant action on January 14, 2010.

III.

THE FIVE-STEP SEQUENTIAL EVALUATION PROCESS

21 To qualify for disability benefits, a claimant must demonstrate a
22 medically determinable physical or mental impairment that prevents him
23 from engaging in substantial gainful activity¹ and that is expected to
24 result in death or to last for a continuous period of at least twelve
25 months. See Reddick v. Chater, 157 F.3d 715, 721 (9th Cir. 1998)

1 Substantial gainful activity means work that involves doing
27 significant and productive physical or mental duties and is done for pay
28 or profit. 20 C.F.R. § 416.910.

1 (citing 42 U.S.C. § 423(d)(1)(A)). The impairment must render the
2 claimant incapable of performing the work he previously performed and
3 incapable of performing any other substantial gainful employment that
4 exists in the national economy. See Tackett v. Apfel, 180 F.3d 1094,
5 1098 (9th Cir. 1999) (citing 42 U.S.C. § 423(d)(2)(A)).

6
7 To decide if a claimant is entitled to benefits, an ALJ conducts
8 a five-step inquiry. 20 C.F.R. § 416.920. The steps are:

9
10 (1) Is the claimant presently engaged in substantial gainful
11 activity? If so, the claimant is found not disabled.
12 If not, proceed to step two.

13 (2) Is the claimant's impairment severe? If not, the
14 claimant is found not disabled. If so, proceed to step
15 three.

16 (3) Does the claimant's impairment meet or equal the
17 requirements of any impairment listed at 20 C.F.R. Part
18 404, Subpart P, Appendix 1? If so, the claimant is
19 found disabled. If not, proceed to step four.

20 (4) Is the claimant capable of performing his past work? If
21 so, the claimant is found not disabled. If not, proceed
22 to step five.

23 (5) Is the claimant able to do any other work? If not, the
24 claimant is found disabled. If so, the claimant is
25 found not disabled.

1 Tackett, 180 F.3d at 1098-99; see also Bustamante v. Massanari, 262 F.3d
 2 949, 953-54 (9th Cir. 2001) (citations omitted); 20 C.F.R. § 416.920(b)-
 3 (g)(1).

4

5 The claimant has the burden of proof at steps one through four, and
 6 the Commissioner has the burden of proof at step five. See Bustamante,
 7 262 F.3d at 953-54. If, at step four, the claimant meets his burden of
 8 establishing an inability to perform the past work, the Commissioner
 9 must show that the claimant can perform some other work that exists in
 10 "significant numbers" in the national economy, taking into account the
 11 claimant's residual functional capacity ("RFC"),² age, education and
 12 work experience. Tackett, 180 F.3d at 1100; 20 C.F.R. § 416.920(g)(1).
 13 The Commissioner may do so by the testimony of a vocational expert or
 14 by reference to the Medical-Vocational Guidelines appearing in 20 C.F.R.
 15 Part 404, Subpart P, Appendix 2 (commonly known as "the Grids"). See
 16 Osenbrock v. Apfel, 240 F.3d 1157, 1162 (9th Cir. 2001). When a
 17 claimant has both exertional (strength-related) and nonexertional
 18 limitations, the Grids are inapplicable and the ALJ must take the
 19 testimony of a vocational expert. See Moore v. Apfel, 216 F.3d 864, 869
 20 (9th Cir. 2000).

21

22 **IV.**

23 **THE ALJ'S DECISION**

24

25 The ALJ employed the five-step sequential evaluation process. At
 26 step one, the ALJ found that Plaintiff had not engaged in substantial

27

28 ² Residual functional capacity is "the most [one] can still do
 despite [his] limitations" and represents an assessment "based on all
 the relevant evidence." 20 C.F.R. § 416.945(a).

1 gainful employment since January 1, 2006. (AR 19). At step two, the
2 ALJ found that Plaintiff had "the severe impairments of hypertension,
3 seizure disorder, [and] unspecified musculoskeletal conditions and
4 headaches." (Id.).

5
6 At step three, the ALJ found that Plaintiff's impairments, either
7 singly or in combination, do not meet or equal the requirements of any
8 impairment listed in 20 C.F.R. Part 404, Subpart P, Appendix 1. (AR
9 19). At step four, the ALJ determined that Plaintiff retained a
10 physical RFC for "a full range of medium work involving no more than
11 occasional climbing and stooping and no concentrated exposure to hazards
12 (including unprotected heights and dangerous machinery [and duties can
13 be performed using the Russian language)." (Id.).

14
15 At step five, the ALJ found that based on Plaintiff's age,
16 educational background, work experience, RFC and the vocational expert's
17 testimony, Plaintiff's "limitations do not preclude performance of past
18 relevant work [as a] home health aide." (AR 19). Accordingly, the ALJ
19 found that Plaintiff was not disabled. (Id.).

20
21 **V.**

22 **STANDARD OF REVIEW**

23
24 Under 42 U.S.C. § 405(g), a district court may review the
25 Commissioner's decision to deny benefits. The court may set aside the
26 Commissioner's decision when the ALJ's findings are based on legal error
27 or are not supported by substantial evidence in the record as a whole.

Aukland v. Massanari, 257 F.3d 1033, 1035 (9th Cir. 2001); Smolen v. Chater, 80 F.3d 1273, 1279 (9th Cir. 1996).

"Substantial evidence is more than a scintilla, but less than a preponderance." Reddick, 157 F.3d at 720. It is "relevant evidence which a reasonable person might accept as adequate to support a conclusion." Id. To determine whether substantial evidence supports a finding, the court must "'consider the record as a whole, weighing both evidence that supports and evidence that detracts from the [Commissioner's] conclusion.'" Aukland, 257 F.3d at 1035 (quoting Penny v. Sullivan, 2 F.3d 953, 956 (9th Cir. 1993)). If the evidence can reasonably support either affirming or reversing that conclusion, the court may not substitute its judgment for that of the Commissioner. Reddick, 157 F.3d at 720-21.

VI.

DISCUSSION

Remand Is Required Because The Record Does Not Support A Finding That Plaintiff Has Any Past Relevant Work

Plaintiff contends that the ALJ erred because the record does not support a finding that Plaintiff has any past relevant work. (See Plaintiff's Memorandum in Support of Complaint ("Complaint Memo.") at 4). Specifically, Plaintiff argues that her prior work as a home health aide does not qualify as past relevant work because she never earned more than the minimum threshold amount per month. (See *id.* at 5). The Court agrees that remand is required on this issue.

1 A plaintiff's prior work qualifies as "past relevant work" for
2 purposes of a disability benefits application "when it was done within
3 the last 15 years, lasted long enough for [the plaintiff] to learn to
4 do it, and was substantial gainful activity." 20 C.F.R. § 416.965.
5 Thus, there are three elements to the existence of past relevant work:
6 (1) recency; (2) duration; and (3) substantial gainful activity. See
7 Social Security Ruling 82-62, available at
8 http://www.ssa.gov/OP_Home/rulings/di/02/SSR82-62-di-02.html. Plaintiff
9 does not dispute the first two elements and focuses instead on whether
10 her prior work as a home health aide constitutes substantial gainful
11 activity. (See Complaint Memo. at 5) ("There does not exist any
12 question about the elements of recency or temporal duration. The
13 question is whether [Plaintiff] ever worked as a home health aide or any
14 other work that amounted to substantial gainful activity.").

15
16 Prior work performed between January of 1990 and June of 1999
17 constitutes substantial gainful activity if the plaintiff earned more
18 than \$500 per month on average. See 20 C.F.R. § 416.974(b)(2)(i) (Table
19 1). Prior work performed between July of 1999 and December of 2000
20 constitutes substantial gainful activity if the plaintiff earned more
21 than \$700 per month on average. See id. Prior work performed after
22 January 1, 2001 constitutes substantial gainful activity if the
23 plaintiff earned on average per month more than \$740 in 2001, \$780 in
24 2002, \$800 in 2003, \$810 in 2004, \$830 in 2005, \$860 in 2006, \$900 in
25 2007, \$940 in 2008, \$980 in 2009, and \$1,000 in 2010. See Monthly
26 Substantial Gainful Activity Amounts Chart, available at
27 <http://www.ssa.gov/OACT/COLA/sga.html>.

1 Here, the Agency determined that Plaintiff's prior work as a home
2 health aide did not constitute substantial gainful activity when it
3 initially denied her application. (AR 79). The ALJ rejected the
4 Agency's determination and instead found that Plaintiff's prior work as
5 a home health aide did constitute substantial gainful activity. (AR
6 18). The ALJ reasoned that Plaintiff's stated earnings in her
7 Disability Report of \$500 per month from January of 1997 to August of
8 1998 and \$600 per month from February of 2003 to February of 2005, (AR
9 105), satisfied the minimum threshold amounts. (AR 18). The ALJ also
10 noted that Plaintiff reported earnings of \$1,826.55 for 2005, (AR 102),
11 and found that this constituted substantial gainful activity. (AR 19).

12

13 Plaintiff argues that the record does not support the ALJ's finding
14 that her prior work constitutes substantial gainful activity. (See
15 Complaint Memo. at 5). Indeed, Plaintiff stated in her Disability
16 Report that she earned \$500 per month from January of 1997 to August of
17 1998 and \$600 per month from February of 2003 to February of 2005. (AR
18 105). These monthly earnings do not satisfy the minimum thresholds to
19 constitute substantial gainful activity. As set forth above, prior work
20 performed between January of 1990 and June of 1999 constitutes
21 substantial gainful activity only if the plaintiff earned more than \$500
22 per month on average. See 20 C.F.R. § 416.974(b)(2)(i) (Table 1).
23 Thus, Plaintiff's stated average monthly earnings of \$500 is
24 insufficient. Similarly, prior work performed in 2003, 2004, and 2005
25 constitutes substantial gainful activity only if the plaintiff earned
26 more per month than \$800, \$810, and \$830 respectively. See Monthly
27 Substantial Gainful Activity Amounts Chart, available at
28

1 <http://www.ssa.gov/OACT/COLA/sga.html>. Thus, Plaintiff's stated average
2 monthly earnings of \$600 is insufficient.

3

4 In her Disability Report, Plaintiff stated that she earned only
5 \$2,881.52 in 1997, \$3,407.54 in 1998, and \$1,826.55 in 2005. (AR 102).
6 Based on her total annual earnings, Plaintiff earned only \$240.13 per
7 month in 1997 and \$283.96 per month in 1998. Because Plaintiff did not
8 earn more than \$500 per month on average, her prior work in 1997 and
9 1998 does not constitute substantial gainful activity. See 20 C.F.R.
10 § 416.974(b)(2)(i) (Table 1). Plaintiff argues that her 2005 earnings
11 represents three months of earnings because a "logical pattern of
12 payment for in home care services [is] at least a month in arrears."
13 (Complaint Memo. at 6). If Plaintiff earned only \$1,826.55 per month
14 for three months from the end of 2004 to the beginning of 2005, her
15 average monthly earnings would be \$608.85 and would not meet the minimum
16 threshold to constitute substantial gainful activity. See Monthly
17 Substantial Gainful Activity Amounts Chart, available at
18 <http://www.ssa.gov/OACT/COLA/sga.html>. The record does not clearly
19 indicate how many months earnings are represented by the \$1,826.55
20 Plaintiff earned in 2005. (AR 102, 105). This discrepancy should be
21 clarified on remand.

22

23 The Court concludes that remand is appropriate because additional
24 proceedings could remedy defects in the Commissioner's decision. See
25 Harman v. Apfel, 211 F.3d 1172, 1179 (9th Cir. 2000); Kail v. Heckler,
26 722 F.2d 1496, 1497 (9th Cir. 1984). On remand, the ALJ must properly
27 apply the minimum threshold earnings requirements to determine whether
28 Plaintiff's prior work as a home health aide constitutes substantial

1 gainful activity. To the extent Plaintiff's Disability Report does not
2 clearly state her monthly earnings, the ALJ should clarify any ambiguity
3 by further developing the record, either through documents or testimony.

4

5 **VII.**

6 **CONCLUSION**

7

8 Consistent with the foregoing, IT IS ORDERED that judgment be
9 entered REVERSING the decision of the Commissioner and REMANDING this
10 matter for further proceedings consistent with this decision. IT IS
11 FURTHER ORDERED that the Clerk of the Court serve copies of this Order
12 and the Judgment on counsel for both parties.

13

14 DATED: August 30, 2010

15

16 _____/S/_____

17 SUZANNE H. SEGAL
UNITED STATES MAGISTRATE JUDGE

18

19

20

21

22

23

24

25

26

27

28